IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1926

HARRY SCHREIBER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS TO OPINIONS BELOW

The Opinion of the District Court is not germaine to any of the questions raised on appeal in the Circuit Court and thus is not reproduced here; it is printed at 449 F. Supp. 856, (1978). The Opinion of the Court of Appeals is not yet printed and is reproduced here as Appendix A, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1979. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED IN APPLYING A MORE STRINGENT STANDARD OF APPELLATE REVIEW THAN THAT CONTEMPLATED BY CONGRESS WHEN IT ENACTED 28 U.S.C. 455.

2. WHETHER THE MANDATE OF 28 U.S.C. sec. 455 (b) (1) DOES NOT REQUIRE THE *SUA SPONTE* RECUSAL OF THE TRIAL JUDGE PRESIDING OVER A NON-JURY TRIAL OF A MOTOR CARRIER PRESIDENT CHARGED WITH GIVING FALSE INFORMATION TO THE I.C.C., WHERE THE TRIAL JUDGE HAD A PRE-FORMED EXTRAJUDICIAL OPINION THAT MOTOR CARRIER PRESIDENTS AS A CLASS HAVE A PREDILECTION TO PERJURE THEMSELVES IN I.C.C. PROCEEDINGS.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix B., infra.

STATEMENT OF THE CASE

The petitioner, a president of a motor carrier corporation was adjudicated guilty of filing false statements with the Interstate Commerce Commission in violation of 18 U.S.C. 1001. This adjudication was made in a non jury trial by a district judge who had previously presided over a jury trial in which the corporation and its general manager had been found guilty on similar charges.

After petitioner had been found guilty and during the course of post-conviction argument, the district judge revealed for the first time that he had had some mental reservations about the propriety of his presiding over the non-jury trial but did not raise the issue because none of the parties questioned his impartiality. The district judge further revealed that his prior experience as a private practitioner before the Interstate Commerce Commission inclined him to the belief that motor carrier presidents had a predilection to lie to the Commission. The issue of the district judge's impartiality and or bias was raised for the first time in the Court of Appeals.

Petitioner's conviction was affirmed by the Third Circuit Court of Appeals on May 3, 1979. A motion for rehearing was denied on May 29, 1979.

REASONS FOR GRANTING THE WRIT

This petition requests review of an erroneous interpretation of 28 U.S.C. 455 by the Third Circuit Court of Appeals.

Petitioner here contends that he was denied due process when the trial judge failed *sua sponte* to recuse himself from presiding at a non-jury trial where the record discloses that the trial was flawed, at the very least, by the appearance of bias on the part of the judge. On appeal, the Third Circuit examined the record against the plain error standard of review. The application of the plain error standard of review was contrary to the express intent of Congress as disclosed by the legislative history of the statute and imposed upon the appellant a higher burden of appellate persuasion than that contemplated by the Congress. The application of an erroneous appellate standard of review has resulted in a decisional conflict with the Circuits and within the Third Circuit itself.

I. The Application of the Plain Error Standard of Review in This Case Was Error and Was Based Upon a Misconstruction of the Statute and the Legislative Intent of Congress.

The issue of disqualification under 28 U.S.C. 455 was not raised in the district court; it was first raised on appeal by the writer of this petition who was retained to handle the appeal. Under the rules of the Third Circuit, counsel for the parties are required to suggest in their briefs the proper standard of review. The appellant below suggested, rather fuzzily, that the standard was whether "the court below failed to comply with the applicable federal statute." The government in its brief suggested that the proper standard was: "whether the district judge had abused its discretion in not recusing himself *sua sponte*." At the oral argument the government abandoned the abuse of discretion standard and opted for the standard of plain-error.

The legislative history of the 28 U.S.C. 455 discloses that Congress specifically considered the standard of appellate review in disqualification cases:

> "Finally, while the proposed legislation would adopt an abjective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound legal discretion." 1974 U.S. Code Cong. and Adm. News, p. 6355.

In its Opinion the majority below recognized that the abuse of discretion standard has been previously recognized in disqualification cases in its own Circuit and

other Circuits. (App. A-4a). Research discloses that this case is the first instance in the Third Circuit or any other Circuit that the plain-error standard has been applied on review of a recusal issue arising under 28 U.S.C. 455. The court's departure in this case from the standard of appellate review intended by Congress and heretofore recognized by the courts is based solely upon the appellant's failure to raise the issue in the district court.

The imposition of the heavier burden of the plain error doctrine on the petitioner as the price for his passivity in the district court is based on a misconception of the thrust and purpose of the statute and erroneously places the duty of affirmative action on the litigants rather than upon the court as Congress intended. While concurring with the majority that the district court's action did not constitute plain error, Chief Judge Seitz in his concurring Opinion places the problem of the applicable standard of review in its proper perspective when he states:

> "But while the majority concludes that the alleged error was not serious enough to merit reversal, I conclude that the plain-error doctrine itself is ill-suited to resolution of the issue in this case. That doctrine's narrower scope of review is predicated on the appellant's duty to call error to the attention of the district court. . . . Here, however, Schreiber was under absolutely no duty to object. Section 455 is mandatory in its terms. A judge must determine, *sua sponte,* whether any of the grounds for disqualification enumerated are present in a case. If any ground specified in section 455 (a) is present, he must disqualify himself immediately. If such specific grounds are not present, but if, for any

> reason, "his impartiality might reasonably be questioned[,]" he must either disqualify himself or seek a waiver after "full disclosure on the record." . . . All this must be done, if necessary, on his own motion. As the Seventh Circuit has noted, section 455 "impose[s] no duty on the parties to seek disqualification nor [does it] contain any time limits within which disqualification must be sought. *SCA Services, Inc. v. Morgan,* 557 F.2d 110, 117 (7th Cir. 1977)." (App. A-13-a)

The Fifth Circuit has also recognized that section 455 is directed to the court and is self-enforcing on the part of the judge. *Davis v. Board of School Com'rs of Mobile County,* 517 F. 2d 1044, 1051, 1052 (Cir. 5, 1979).

The majority below apparently assumes that the district court can only abuse its discretion when specifically requested by one of the parties to exercise it; this is an erroneous assumption and ignores the fact that the statute requires the judge to exercise his discretion with or without a specific request to do so. In this case as indicated by both the majority and concurring Opinion the district court was concerned about the propriety of his presiding over this trial, but did not disclose his concern because "nobody raised any question about it." Clearly the district court's decision to remain silent about his concern and his failure to seek a waiver after "full disclosure on the record" constituted an exercise of judicial discretion. Whether that decision was a proper exercise of or an abuse of his discretion was never decided by the court below because it was measured against the erroneous standard of the plain error doctrine. The decision of the trial judge not to reveal the existence of what the majority terms an "impersonal

prejudice" until the trial was over and a finding of guilt was made also required him to exercise his discretion. The court's discretionary decision to remain silent on this point should also have been measured against the standard of review that Congress intended.

In his concurring Opinion Judge Seitz states: "Apparently, the district judge misunderstood his obligations under section 455.". It is our contention that the decision of the majority has compounded the district judge's misunderstanding of his obligations under section 455. The legislative history of section 455 refers to the issue of disqualification as a "sensitive question". 1974 U.S. Code Cong. and Adm. news, p. 6355. By giving its appellate benediction to the trial court's failure to raise the recusal issue, sua sponte, the majority has opened the way for district courts to display an unwarranted and heretofore unapproved degree of insensitivity to their obligations under section 455. While Congress intended to place the responsibility for compliance with the mandates of the statute squarely on the shoulders of the district court, the Third Circuit has now lifted that initial responsibility from the shoulders of the court and shifted the initial responsibility to the shoulders of the parties.

After reviewing a number of the problems raised by the proper application of section 455 to this case, the concurring opinion states: "These difficult questions, never aired below, illustrate the awkwardness of a plain-error inquiry in this case.". Chief Judge Seitz then concludes that Schreiber's section 455 claim would be better resolved by means of a collateral attack under 28 U.S.C. §2255, although he clearly recognizes that that procedure is not without considerable additional hazard. While

Chief Judge Seitz may feel collateral attack by means of a §2255 motion may offer a viable means of resolution of the disqualification issue, we respectfully submit that it does not. It is well settled that §2255 motions are not proper substitutes for an appeal and that questions raised on appeal may not be relitigated by means of a collateral attack upon the sentence. The Third Circuit in its majority opinion in this case has at least partially passed upon petitioner's §455 claim, even though the concurring opinion writer seems to have some reservation about the legal effect of the majority opinion. The principal difficulty with the §2255 route is that, in order for such a motion to lie, the movant must either be in jail or on probation. It is submitted that the petitioner has the right to have his §455 claim decided on appeal by an application of the appellate standard of review contemplated by Congress, and should not be relegated to pursuing his rights from prison.

2. Petitioner Was Denied Due Process Where the District Judge Who Presided Over His Non-Jury Trial was Prejudiced Against That Class of Persons of which Petitioner was a Member.

As indicated previously the issue of disqualification was not raised in the district court; the facts which gave rise to the issue in the court of appeals came to light in the colloquy between the trial judge and trial counsel at the argument of post-conviction motions. That colloquy is accurately set forth in the majority opinion and is not re-reproduced in this petition. That colloquy reveals that the trial judge, as a result of his experience as a private practitioner before the ICC, had a rather low opinion of motor carrier presidents' credibility. In point of fact, the district court indicated that his experience had taught him that motor carrier presidents had a predilection to lie to the ICC and that such an attitude or propensity had a bearing on the guilt of petitioner Schreiber. After making this revelation, the trial court said that he tried to keep things like that out of his mind and did not permit it to color his thinking. Whether the court did keep his personal opinions out of his mind is at best conjectural; at this point, however, it is clear that the court never made the parties privy to this potentially prejudicial information until long after he had, sitting as judge and jury, found the defendant guilty of lying to the ICC. It seems fairly obvious that that had Schreiber and his counsel been apprised of the court's attitude toward the credibility of motor carrier president's they might reasonably have questioned the court's impartiality or at the very least have reconsidered their waiver of a jury trial.

The majority dismissed this claim of bias on the ground that it was merely evidence of "Impersonal" prejudice as opposed to a personal prejudice against a particular party in the case, citing its previous decisions in *United States v. Dansker,* 537 F.2d 40, 54 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977) and *Parker Precision Products Co. v. Metropolitan Life Insurance Co.,* 407 F. 2d 1070-78 (3d Cir. 1969). These cases do not support the majority's holding in this case. *Dansker, supra.,* was a jury case in which the trial court was not called upon to consider the credibility of the testimony. *Parker, supra.,* was decided on a matter of pure law and did not involve a question of bias toward any class of persons. Petitioner's claim of trial court bias was based upon the trial court's unfavorable impression of the credibility of motor carrier presidents, a class of which the petitioner here was a member. The decision of the majority below totally ignored the issue of class bias and conflicts with its previous decision in *United States v. Thompson,* 483 F.2d 527 (3d Cir. 1973).

In *United States v. Thompson, supra.,* the majority of the Third Circuit held that the policy of one of its district court judges to sentence all Selective Service violators to thirty months showed personal bias and remanded the case for a new trial before a new judge. In *Thompson, supra.,* the Third Circuit relied upon this Court's decision in *Berger v. United States,* 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921) in which this Court held that an alleged bias toward defendants who were born in Germany or Austria was sufficient to require recusal. While presumably a relatively small group, motor carrier presidents who are subject to ICC regulations are an identifiable class and are constitutionally

entitled to trials free of the appearance of bias, as are Baptists, Oil Company officers, and German born nationals. The decision of the majority below is in conflict with the decision of this Court in *Berger, supra.*, in that it would sanction district court bias toward a class of litigants and afford relief only in those rare situations where it can be demonstrated that the district court had an *individual* personalized bias against the particular member of the class which was the subject of his prejudice.

This Court has long been interested in the fundamental proposition that "justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 75 S. Ct. 11, 13, 99 L. Ed. 11, 1954; *Public Utilities Comm. v. Pollack,* 343 U.S. 451, 466-467, 72 S. Ct. 813, 822-823, 96 L. Ed. 1068 (1952). In this case, the appearance of justice has been blemished by the disclosure of a latent judicial class bias. It is submitted that the blemish of bias in this case cannot be judicially debrided or constitutionally cured by simply labelling it as "impersonal". The petitioner here was entitled to a fair trial before an impartial judge; the failure of the Third Circuit to recognize that right is of sufficient importance to warrant a grant of certiorari by this Court.

CONCLUSION

Review of this case by this Court is important because the majority opinion of the Third Circuit has misinterpreted the legislative intent of an act of Congress. This misinterpretation has created a decisional conflict within the Third Circuit itself and within the various Circuit Courts of the United States.

By erroneously applying the plain-error standard of review to this case, the Third Circuit has ignored the legislative intent of Congress and has impermissably shifted the initial responsibility of compliance with the mandates of §455 from the district court to the litigants, and has thus relieved the court of its statutory duty to recognize and raise, sua sponte, sensitive questions of disqualification. While Congress has directed the enforcement of the statute to the courts, the Third Circuit has now directed the enforcement of the statute to the parties and placed upon the parties a burden of vigilance that virtually amounts to a requirement of clairvoyance. In 1974 §455 was enacted in its present form in order to "promote public confidence in the judicial process". Public confidence in the judicial process is not likely to be promoted, if, as here, district courts are granted appellate permission to ignore their obligations under 28 U.S.C. 455.

The appropriate standard of review in disqualification cases has been suggested by Congress and up until now, has been uniformly followed in all Circuit Courts. The Third Circuit has departed from that standard and has created a conflict in the Circuits. Therefore we respectfully request this Court to grant review in this

case or, in the alternative, to remand the case to the Third Circuit for reconsideration under the proper standard of appellate review.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2140

UNITED STATES OF AMERICA

v.

SCHREIBER, HARRY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 77-00158)

Argued March 23, 1979
Before: SEITZ, *Chief Judge,* and ALDISERT and ROSENN, *Circuit Judges.*
(Opinion filed May 3, 1979)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The major question for decision is whether the trial judge committed plain error in failing *sua sponte* to recuse himself in a non-jury trial in which appellant, president of a motor carrier corporation, was adjudicated guilty of filing false and fraudulent statements with the Interstate Commerce Commission (ICC), in violation of 18 U.S.C. §1001. The judge had previously presided over a jury trial in which the corporation and its general sales manager had been found guilty of similar charges. We find no plain error on the part of the trial judge, and we affirm the judgment of conviction.

Appellant Harry Schreiber, represented by privately retained counsel, requested a bench trial, fully aware that the same trial judge had presided two years earlier over a jury trial in which his company, Schreiber Freight Lines, and Joseph Bruzzese, its general sales manager, had been found guilty of filing false statements with the ICC and mail fraud. Corporate counsel had represented the defendants in the prior proceedings.

On appeal, Schreiber does not challenge the efficacy of his jury trial waiver. Nor does he argue that the trial judge was disqualified as a matter of law because he presided over the separate jury trial of related defendants. Indeed, at oral argument appellant conceded that he does not challenge the precept that a judge need not withdraw from a case merely because he or she has presided in a related or companion case. *See, e.g., United States v. Cowden,* 545 F.2d 257, 266 (1st Cir. 1976), *cert. denied,* 430 U.S. 909 (1977). Lastly, inasmuch as none of the three issues before us on appeal was raised in the district

court, appellant is not contending that the trial judge erred in any ruling below.

Rather, through new counsel, appellant now contends that the failure of the judge to recuse himself was so egregious as to come within the plain error rule. "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson,* 297 U.S. 157, 160 (1936). But a litigant cannot obtain a new trial because of alleged errors to which he assented during the first trial. "Any other course would not comport with the standards for the administration of criminal justice. We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him." *Johnson v. United States,* 318 U.S. 189, 201 (1943).

This court has been hospitable to claims of plain errer in direct criminal appeals when it has been convinced that the error is "grievous," *United States v. Gray,* 468 F.2d 257, 258 (3d Cir. 1972), or "so fundamental in nature as to deprive a party of fundamental justice," *United States v. Moore,* 453 F.2d 601, 604 (3d Cir. 1971), *cert. denied,* 406 U.S. 925 (1972); *United States v. Dolasco,* 410 F.2d 1297, 1299 (3d Cir. 1972), *cert. denied,* 411 U.S. 919 (1973); *United States v. Bazbano,* 570 F.2d 1120, 1128 (3d Cir. 1977), *cert. denied,* 436 U.S. 917 (1978), or otherwise constitutes a "manifest miscarriage of justice," *United States v. Provenzano,* 334 F.2d 678, 690 (3d Cir.), *cert. denied,* 379 U.S. 947

(1964); *United States v. Grasso,* 437 F.2d 317, 319 (3d Cir. 1970), *cert. denied,* 403 U.S. 920 (1971); *United States v. Hines,* 470 F.2d 225, 229-30 (3d Cir. 1972), *cert. denied,* 410 U.S. 968 (1973). Fed. R. Crim. P. 52(b).

It therefore appears that appellant's burden on a direct criminal appeal, when asserting that the failure of the trial judge to disqualify himself is plain error, may be heavier than under the accepted standard for reviewing judicial disqualification cases when the claim has first been asserted in the district court. In the latter cases the "proper inquiry on appeal is whether the district judge abused his discretion." *Mayberry v. Maroney,* 558 F.2d 1159 1162 (3d Cir. 1977). *See United States v. Dansker,* 565 F.2d 1262, 1266-67 (3d Cir. 1977, *cert. Dismissed,* 434 U.S. 1052 (1978.[1]

It is against the plain error standard that we examine the specific argument of the appellant—a broad based contention that the trial judge was required to disqualify himself because he was plainly not an impartial jurist as required by 28 U.S.C. §455:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

1. Other circuits have also applied the abuse of discretion standard. *SCA Services, Inc. v. Morgan,* 557 F.2d 110, 118 (7th Cir. 1977); *United States v. Haldeman,* 559 F.2d 31, 139 n.359 and accompanying text (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> ....
>
> (e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

I.

To support his contention Schreiber first cites a passage from the memorandum opinion in the corporation's trial in which the district judge wrote, "The evidence of Wurzer particularly showed how the false communications were prepared and also showed knowledge on the part of Harry Schreiber, President of the defendant corporation of the preparation of the communications in question." Appellant's Brief at 7.

Schreiber says that "[t]his prior finding by the judge that was to preside as a factfinder in a subsequent trial *clearly* raises a reasonable question of impartiality . . . ." *Id.* (emphasis added). In a review for plain error, we cannot discover in the prior finding of the district court a reasonable basis for doubting the court's impartiality. If the statement should have raised a reasonable question of disqualification, it certainly did not occur to appellant or his counsel to raise it on December 12, 1977, when appellant requested that the judge who wrote these

words about him in November 1976 should sit as fact finder in his criminal trial. Section 455(e) precludes waiver of a charge of personal bias under §455(b). The conduct of appellant in requesting the non-jury trial is relevant, however, to the question, under §455(a), of whether the judge's "impartiality might reasonably be questioned," because disqualification under §455(a) may be waived after full disclosure. The House report accompanying §455 emphasized:

> Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

H.R. Rep. No. 1453, 93d Cong., 2d Sess. —, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6355.

Appellant points to a statement of the trial judge, made in the course of post-trial argument, which he characterizes as a recognition by the judge of his partiality. As we understand his argument, it is that when a judge entertains doubts as to his own impartiality he has the obligation to articulate those doubts publicly and that failure to do so is plain error. The following colloquy is urged as the basis for disqualification under this argument:

> *The Court*: Let me say, also, I presided over the first trial, and I was concerned as to whether I should preside over this trial. But nobody raised any question about it; and in my own mind, at the conclusion of the first trial, I said when I began to become aware of what was going on, I began to wonder about Harry Schreiber's involvement, and I concluded the first trial with the thought in my mind the government did not have sufficiently clear evidence that Harry Schreiber was involved to justify his indictment.
>
> Now that was my conclusion at that time. So I started the second trial with that in mind, that the government had better have some pretty good evidence to bring him in personally.
>
> [*Defense Counsel*]: I will state to Your Honor that that consideration was fully explored by myself and my client, whether we should object to Your Honor sitting at a non-jury trial, having heard the first trial. It was our conclusion that you would be fair in the determination of these issues, and we did not raise the objection.

Appendix at 67a-68a.

We recognize the sound public policy considerations that would militate for the adoption of the *per se* rule urged upon us. A public expression would alert the litigants to the existence of problems which would otherwise remain undisclosed. The necessity for the rule—that the parties should be apprised of any possible ground for disqualification known privately to the judge—is therefore the reason supporting the rule.

Whatever our inclination would be in a case where we found reason for such a rule, we find none here. The appellant acknowledged that he had entertained the same doubts as the judge, and like the judge, he rejected those doubts. Appellant's counsel unequivocally stated

that "that consideration was fully explored by myself and my client, whether we should object to Your Honor sitting at a non-jury trial . . . ." *Id.*

Since there was knowledge of the problem in this case, there was no need of a public communication from the judge. Whatever appeal the proposed rule might have under different facts, in this case there is no necessity, and hence no reason for adoption of the rule. Karl Llewellyn's elegant statement of the old maxim seems most apropos: the rule follows where its reason leads; where the reason stops, there stops the rule.[2]

This consideration aside, we do not regard the judge's statement as one of "personal bias or prejudice." If anything, it is but a restatement of the presumption of innocence for the judge to say "the government had better have some pretty good evidence to bring him in personally."

II.

Appellant next contends that there was evidence that the trial judge had a "personal bias or prejudice" against all presidents of motor carriers, a state of mind he acquired from his previous personal experience as a lawyer who appeared regularly before the ICC. Appellant relies on the following colloquy:

> *The Court*: Schreiber Freight paid a civil forfeiture of $2,000 for twenty violations of operating beyond the scope of its authority. January '74 to July '74, Schreiber was again found guilty of 61 violations of operating beyond the scope of authority.

2. K. Llewellyn, THE BRAMBLE BUSH 157-58 (1960).

> The Court considers this as some evidence of intent and attitude of the defendant towards the ICC rules and regulations.
>
> *Mr. Martin*: Is the intent and attitude of the individual defendant properly affected by the corporate pleas to these civil forfeitures? That's the issue that I raise.
>
> *The Court*: Well, he is president and sole stockholder of this corporation. It seems to me it is some indication of an attitude, "To the dickens with the ICC. Anything you get away with is okay as far as the ICC goes."

Appendix at 55a-56a.

> *The Court*: In the early days of the Motor Carriers Act, I think there were a larger number of people who were presidents of trucking companies who would come up the hard way from practically nothing, who displayed this attitude towards the Commission, than there are now.
>
> The attitude in the early days was, "Do anything you can get away with, as far as the Commission is concerned."
>
> *Mr. Schwabenland*: From my understanding from working with the ICC people, I think that attitude is still going on.
>
> *The Court*: I once recall a remark I heard after a hearing with respect to a president of a trucking line in the South, who I will not name.
>
> One man says, "I know him. I believe him any time except when he is under oath in an ICC hearing."

And that was the attitude.

Mr. Schwabenland: Mm-hmm.

The Court: It seems to me that attitude or any attitude of that kind has some bearing upon the guilt or innocence of Mr. Schreiber here.

Mr. Schwabenland: Yes, Your Honor.

You have often stated throughout the trial that you as an ex-ICC attorney know what goes on in the ICC. I don't know what that had to play upon your impression of the facts, but you are the trier of facts.

We both agree—

The Court: Well, I tried to keep anything like that that I might know personally, because some of the things I have been mad at the ICC about, too, here.

Mr. Schwabenland: Yes, Your Honor.

The Court: So many people get away, and then other times I though they were a little harsh. But that really has not colored my thinking here at all.

Appendix at 64a-65a.

We do not agree that these statements constitute evidence of personal bias or prejudice. Distilled to their essence, they simply reflect his past impressions of *both* motor carrier presidents *and* the ICC. This court has held that evidence of an *impersonal* prejudice deriving from the judge's background and associations, rather than his appraisal of the parties personally, is not a proper basis for disqualification. *United States v. Dansker*, 537 F.2d 40, 54 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), *Parker Precision Products Co. v. Metropolitan Life Insurance Co.*, 407 F.2d 1070, 1077-78 (3d Cir. 1969).

III.

Schreiber also alleges that he had ineffective assistance of counsel in the district court. Unlike the question of the trial judge's disqualification, which the district court arguably considered even though no objection was lodged prior to appeal, we find that the incompetency of counsel issue was never presented to the district court. "We decline to consider that claim, believing it preferable to follow the normal procedure of having the issue appropriately presented to the district court in the first instance." *United States v. Garcia*, 544 F.2d 681, 684 n.1 (3d Cir. 1976). In *United States v. Bazzano*, 570 F.2d 1120, 1128 (3d Cir. 1977), *cert. denied*, 436 U.S. 917 (1978), this court also refused to pass on an ineffective assistance of counsel claim because it was not plain error.

Finally, appellant attacks the imposition of a sentence of 18 months, when he might have received 35 years imprisonment. It is settled that although sentencing procedures may be reviewed, the product of a sentencing court's exercise of discretion is not reviewable. *Del Piano v. United States*, 575 F.2d 1066, 1067 (3d Cir. 1978).

The judgment of the district court will be affirmed.

SEITZ, *Chief Judge,* concurring.

Although I agree with the majority that we should affirm Schreiber's conviction and sentence, I would do so without disturbing Schreiber's right to seek collateral review of either his claim that the district court violated 28 U.S.C. §455 or his claim of ineffective assistance of counsel. I write separately because it is not at all clear to me whether the majority decides the merits of Schreiber's claim under section 455.

Schreiber argues for the first time on appeal that the trial judge erred in not disqualifying himself under section 455. I start, as I must, from the general proposition that "[a]llegations of error not properly raised in the trial court cannot be considered on appeal." *United States v. Carter,* 401 F.2d 748, 750 (3d Cir. 1968), *cert. denied,* 393 U.S. 1103 (1969). A narrow exception to the rule that appellate courts may not consider claims *de novo* is the doctrine of "plain error." *See* Fed. R. Crim. P. 52(b). This exception allows an appellate court, in "exceptional circumstances," to notice obvious errors or errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson,* 297 U.S. 157, 160 (1936). The price an appellant pays for his failure to object is a heavier burden of persuasion. He must show that the error was plain.

Like the majority, I believe that it is inappropriate to take cognizance, under the plain-error doctrine, of Schreiber's claim that the district court violated section 455. But while the majority concludes that the alleged error was not serious enough to merit reversal, I conclude that the plain-error doctrine itself is ill-suited to resolution of the issue in this case. That doctrine's narrower scope of review is predicated on the appellant's

duty to call error to the attention of the district court: "a party may not sit by silently, take his chances on a verdict, and, if it is adverse, then complain of a matter which, if error, could have been eradicated during the trial if brought to the attention of the court . . . ." *United States v. Bamberger,* 456 F.2d 1119, 1131 (3d Cir. 1972), *cert. denied,* 406 U.S. 969 (1972), 413 U.S. 919 (1973). Here, however, Schreiber was under absolutely no duty to object. Section 455 is mandatory in its terms. A judge must determine *sua sponte,* whether any of the grounds for disqualification enumerated in that provision are present in a case. If any ground specified in section 455(b) is present, he must disqualify himself immediately. If such specific grounds are not present, but if, for any reason, "his impartiality might reasonably be questioned[,]" he must either disqualify himself or seek a waiver after "full disclosure on the record." *See* 28 U.S.C. §§455(a), 455(e). All this must be done, if necessary, on his own motion. As the Seventh Circuit has noted, section 455 "impose[s] no duty on the parties to seek disqualification nor [does it] contain any time limits within which disqualification must be sought. *SCA Services, Inc. v. Morgan,* 557 F.2d 110, 117 (7th Cir. 1977).

Apparently, the district judge misunderstood his obligations under section 455. The subject of impartiality was not broached until the hearing on Schreiber's motion for a new trial. Although Schreiber had not raised this issue in his motion, the judge spontaneously remarked that he had been "concerned" about presiding at the trial. The district judge's own doubts suggest, although they do not necessarily establish, that his impartiality might reasonably be questioned. If the district judge had decided, in the sound exercise of his discre-

tion, that such a question existed, then he would have been obligated in the absence of a valid waiver to disqualify himself from the case. Instead, he neither acted on nor disclosed his concern because "nobody raised any question about it[.]"

Assuming that the district court should have sought Schreiber's waiver, I have several doubts as to whether the colloquy cited by the majority can measure up to the strict standard for waiver set forth in section 455(e). First, the dialogue seemed to occur accidentally, after a full trial and long after the district judge first became concerned about presiding. Moreover, the district judge's offhand expression of that concern may fall far short of the requisite "full disclosure on the record." Finally, defense counsel's unsolicited statement that he had "fully explored" the situation and that he "did not raise the objection" is ambiguous. He seemed to be referring, not to a present waiver, but to a prior decision not to seek disqualification, a decision made without the benefit of any disclosure whatsoever. Counsel may not have understood that, even at that late moment in the proceedings, Schreiber still had a right to seek the judge's disqualification.

These difficult questions, never aired below, illustrate the awkwardness of a plain-error inquiry in this case. I believe that Schreiber's claim that the district court violated section 455, like his claim of ineffective assistance of counsel, is better suited to collateral attack under section 28 U.S.C. §2255. I fear, however, that the majority's decision may prejudice his ability to secure collateral relief. In *Sanders v. United States,* 373 U.S. 1 (1962), the Supreme Court set forth the criteria for evaluating successive petitions under section 2255. Where a

prisoner presents a petition relying on a ground denied "on the merits" in an earlier petition, the prisoner bears the burden of demonstrating that "the ends of justice would be served by a redetermination of the ground." *Id.* at 17. *See also* Rule 9, Rules Governing §2254 Cases, and Rule 9, Rules Governing §2255 Cases, and accompanying Advisory Committee Notes (codifying holding in *Sanders*). Although *Sanders* dealt with successive petitions for collateral relief, the Supreme Court has indicated that the same standards should govern an initial petition under section 2255 "where the trial or appellate court has had a 'say' on the federal prisoner's claim." *Kaufman v. United States,* 394 U.S. 217, 227 n.8 (1969). *See also Davis v. United States,* 417 U.S. 333, 342 (1974); *Thornton v. United States,* 368 F.2d 822, 833 (D.C. Cir. 1966) (Wright, J., dissenting), *cited with approval in Kaufman v. United States, supra,* at 227 n.8.

I refrain from deciding whether we have had a "say" on Schreiber's claim under section 455, or whether a determination that a particular action is not plain error constitutes a decision "on the merits" of an issue. *Compare United States v. Currie,* 589 F.2d 993, 994-95 (9th Cir. 1979) (finding of no plain error on direct appeal precludes similar claim on collateral attack) *with United States v. Kazni,* 576 F.2d 238, 242 (9th Cir. 1978) (finding of no plain error on direct appeal will not preclude collateral attack if applicant alleges facts outside the appellate record). I only note that if we have triggered *Sanders,* Schreiber will bear the additional burden on collateral attack of demonstrating that the "ends of justice" would be served by a re-examination of his claim. On the other hand, if we somehow have stopped short of a determination of the merits of Schreiber's

claim, then our decision seems a useless exercise. In either case, I believe it preferable to defer on the merits of Schreiber's claim under section 455, just as we have deferred on his ineffective-assistance-of-counsel claim. Schreiber is entitled to full consideration of each claim by a district court in the first instance, without the inhibitive effect of the majority's thoughts on the claims.

I would affirm Schreiber's conviction without expressing any opinion on the merits of either his claim under section 455 or his claim of ineffective assistance of counsel.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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APPENDIX B

28 U.S.C. PROVIDES INTER ALIA:

"(A) Any Justice, Judge, Magistrate, or Referee in Bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(B) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding: . . .

(E) No Justice, Judge, Magistrate or Referee in Bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."
